2404

SUPREME COURT OF THE UNITED STATES.

No. 133.

JOSEPH S. CUCULLU, PLAINTIFF IN ERROR,

vs.

LOUIS EMMERLING.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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GIDEON, print.

Pleas and proceedings before the honorable the Circuit Court of the United States in and for the fifth judicial circuit of the United States and the eastern district of Louisiana, in the case of Louis Emmerling vs. Joseph S. Cucullu.

At the November term, 1857, of the said court, holden at the city of New Orleans, in the district aforesaid, on the 6th day of November, 1857.

Be it remembered, that on the 20th day of October, A. D. 1857, came Louis Emmerling into the clerk's office of the said court, by his counsel, Messrs. Benjamin, Bradford and Finney, and filed a petition in words and figures as follows:

Petition.—Filed 20th October, 1857.

To the honorable the Circuit Court of the United States for the eastern district of Louisiana:

The petition of Louis Emmerling, a resident of New Orleans, an alien subject of the Grand Duke of Hesse Darmstadt, humbly shows:

That Joseph Salustius Cucullu, a citizen of the United States, and resident of the city of New Orleans, is justly indebted unto petitioner in the full sum of twenty-seven hundred dollars, for this, to wit:

That the said Cucullu employed this petitioner as a broker, to sell a plantation belonging to said Cucullu. That petitioner succeeded in selling the same for the price of one hundred and thirty-five thousand dollars, on terms satisfactory to said Cucullu, as will fully appear by the annexed written contract of sale between said Cucullu and A. W. Walker, dated on the 10th August, 1857, which contract was drawn up by petitioner in his own handwriting. That said contract was consummated by the passing of an authentic act of sale, the delivery of the property to the purchaser, and the receipt of the price by said Cucullu.

Petitioner shows, that notwithstanding the premises, said Cucullu refuses to pay him the brokerage due for petitioner's services in effecting the sale, which brokerage is two per cent. on the amount of the sale, making said sum of twenty-seven hundred dollars.

Wherefore petitioner prays that said Cucullu be cited and condemned to pay said sum of twenty-seven hundred dollars, with interest from judicial demand and costs.

(Signed) BENJAMIN, BRADFORD & FINNEY,
For Pet'r.

Contract annexed to Petition.

Je le soussigne ni engage á acheter et en passer la vente immediatement (aussitot que possible) l'habitation appartenant á S.

Cucullu á environ 8 milles de la viele telle qu'elle se compose ainsi que tous les droits et interets qui peuvent exister et les esclanes d'aprés la liste-ci-annexée le prix et les conditions d'achat sont comme suit et ils sont acceptes par la presente par les parties contractantes savoir.

$135,000, cent trente cinq mille piastres dont.
30,000, dûs par le dit S. Cucullu pardes billets que le dit A. Walker s'engage a retirer et remettre au dit vendeur en passant la vente.
20,000, a assumer payable le ¼ Fevrier, 1858, dûs à Mr. Croise Villavasso, au portun.
5,000, comptant.
13,333 33⅓, payable ou 10-13 December, 1858.
13,333 33⅓, do 10-13 do 1859.
13,333 33⅓, do 10-13 do 1860.
13,333 33⅓, do 10-13 do 1861.
13,333 33⅓, do 10-13 do 1862.
13,333 33⅓, do 10-13 do 1863.

$135,000 00

Portant intérêt à raison de 5 p. c., l'au jusqu'a l'échéance et 8 p. c. après echéance.

A. W. WALKER,
JOSEPH S. CUCULLU.

ANEDEE DUCATEL, Witness.
THEO. GUYOL, Witness.
New Orleans, 10th August, 1857.

Answer.—Filed 29 Oct., 1857.

To the Honorable the Circuit Court of the United States for the eastern district of Louisiana:

The answer of Joseph Salustino Cucullu, of this city, to the petition of Louis Emmerling, respectfully represents: That he denies all and singular the facts and allegations in said petition contained, and he prays to be hence dismissed with costs, and for general and equitable relief.

E. FILLEUL, *of Counsel*.

Minutes.

NEW ORLEANS, *Friday*, 6 *November*, 1857.

Court met pursuant to adjournment.
Present, Hon. Theo. H. McCaleb, district judge.

LOUIS EMMERLING
vs.
JOSEPH S. CUCULLU.

This cause came on to be heard, and was argued by counsel and submitted to the court.

Statement of Facts.—Filed 14th Dec'r, 1857.

The plaintiff, Louis Emmerling, a resident of the city of New Orleans, and an alien subject of the Grand Duke of Hesse Darmstadt, brings this suit against the defendant, a citizen of Louisiana, to recover the sum of twenty-seven hundred dollars, which he alleges is due him as the amount of his commissions on a sale effected by him as a broker.

The court finds that the defendant, Cucullu, offered his plantation and slaves for sale for the sum of one hundred and thirty-five thousand dollars, on the following terms, viz: the purchaser to pay in cash the sum of thirty-five thousand dollars, and assume the payment of a note of twenty thousand dollars, payable on the first and fourth of February, 1858, and for the residue of the price the purchaser to pay $13,333 33⅓ on the 10th and 13th December, 1858; $13,333 33⅓ on the 10th and 13th December, 1859; $13,333 33⅓ on the 10th and 13th of December, 1860; $13,333 33⅓ on the 10th and 13th of December, 1861; $13,333 33⅓ on the 10th and 13th of December, 1862; $13,333 33⅓ on the 10th and 13th December, 1863—the six last-mentioned sums to bear interest at the rate of five per cent. per annum until maturity, and interest at the rate of 8 per cent. after maturity until paid.

The court finds that the plaintiff, Emmerling, in his capacity as broker, offered to find a purchaser for the plantation and slaves; and that he opened a negotiation with A. W. Walker, who finally purchased the same on the terms above mentioned; that the written contract of sale attached to the petition is in the handwriting of the plaintiff, and signed by the defendant and Walker.

The court further finds, that while there was no direct or positive proof that the defendant, Cucullu, promised to pay the plaintiff his commissions for negotiating the sale, yet that he did recognise the services of the said plaintiff, and his own liability to pay for those services, in a conversation which he had with the said plaintiff in the presence of A. W. Walker, the purchaser of the property.

The court further finds, that it was through the intervention of the plaintiff, as broker, that the sale of the property was effected. The facts upon which the foregoing conclusions of the court are founded, were mainly furnished in the testimony of said A. W. Walker. The witness Guyol, the notary public, before whom the title to the property was passed, also proved that the defendant, Cucullu, inquired of him the amount of the commissions charged by the broker, and that he, Guyol, answered, that the amount was two per cent. on the price of the property. The usual rate at which broker's commissions for like services are charged is two per cent.,

as appears from the testimony of several brokers who were examined on the trial. It is therefore ordered and adjudged, that the plaintiff recover from the defendant the sum of twenty-seven hundred dollars, the amount of his commissions as broker, and it is further ordered that the defendant pay the costs of this suit.

THEO. H. McCALEB,
U. S. Judge.

Judgment.

November term, 1857.—New Orleans, Saturday, 7th November, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dist. judge; absent, Hon. J. A. Campbell, presiding judge.

LOUIS EMMERLING
vs. } 2,810.
JOSEPH S. CUCULLU.

The court having considered this cause, and being of opinion that the law and the evidence are in favor of the plaintiff, doth now order, adjudge and decree, that the said plaintiff, Louis Emmerling, do have and recover judgment against the defendant, Joseph S. Cucullu, for the sum of twenty-seven hundred dollars, with interest thereon, at the rate of five per cent. per annum from the 20th day of October, 1857, until paid, and costs of suit.

Judgment rendered 7th Nov., 1857.
" signed 1857.

THEO. H. McCALEB,
U. S. Judge.

Minutes.

November term, 1857.—New Orleans, Tuesday, 10th Nov., 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dist. judge.

LOUIS EMMERLING
vs. } Motion for New Trial.
JOSEPH S. CUCULLU.

On motion of E. Filleul, esq., of counsel for defendant, it is ordered that the plaintiff show cause on Saturday next why a new trial should not be granted herein, on the following grounds:

1st. That the judgment is contrary to law and evidence.

2d. It is contrary to articles 2,257 and 2,267 of the Civil Code of Louisiana.

Service accepted.

BENJAMIN.

Minutes.

November term, 1857.—New Orleans, Saturday, 14th Nov., 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dist. judge.

LOUIS EMMERLING vs. JOS. S. CUCULLU. } 2,810.

The application herein made by defendant for a new trial was called for hearing; E. Filleul, esq., appearing for the plaintiff in rule, the counsel for the defendant in rule absent; whereupon, after argument, the application was submitted to the court and taken under advisement.

New Orleans, Thursday, 19 Nov., 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge.

LOUIS EMMERLING vs. JOSEPH S. CUCULLU. } 2,810.

The court having considered the application made in this case for a new trial, doth now order that the same be denied, and that the application be dismissed.

Petition for Writ of Error.—Filed 27 Nov., 1857.

To the hon. the judges of the Circuit Court of the United States, fifth circuit and eastern district of Louisiana:

The petition of Joseph S. Cucullu respectfully shows, that he is aggrieved by the judgment herein rendered against him, at the suit of Louis Emmerling, on 21st November, 1857, and that he is advised that there is error therein to his prejudice. Wherefore he prays that a writ of error be allowed him, returnable to the next term of the Supreme Court of the United States, that the proceedings in said cause may be reviewed, upon his giving such bond as the court may direct, and that the said writ may operate as a supersedeas, and the petitioner prays for general relief; and, as in duty bound, &c.

E. FILLEUL,
Of Counsel.

Minutes.

November term, 1857.—New Orleans, Saturday, 28th Nov., 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dist. judge.

LOUIS EMMERLING vs. JOSEPH S. CUCULLU. } 2,810.

On motion of E. Filleul, esq., of counsel for defendant, and on presenting and filing the petition of said defendant, setting forth that he is aggrieved by the final judgment herein rendered against him, and praying a writ of error therefrom to the next term of the Supreme Court of the United States, the same to operate as a supersedeas, it is ordered that the writ be allowed as prayed for upon plaintiff giving bond, conditioned according to law, in the penal sum of forty-one hundred and fifty dollars, with good and solvent surety thereon.

Bond for Writ of Error.—Filed 28th Nov., 1857.

Know all men by these presents, that we, Joseph S. Cucullu, as principal, and J. Llado as surety, are held and firmly bound unto Louis Emmerling in the full and just sum of forty-one hundred and fifty dollars, to be paid to the said Louis Emmerling, his certain executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of November, in the year A. D. 1857. Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, at the city of New Orleans, in a suit depending in said circuit court, wherein Louis Emmerling is plaintiff and Joseph S. Cucullu is defendant, judgment was rendered against the said Joseph S. Cucullu, defendant; and the said Joseph S. Cucullu having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Emmerling, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Joseph S. Cucullu shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JOSEPH S. CUCULLU, [SEAL.]
J. LLADO. [SEAL.]

Sealed and delivered in presence of—
J. W. GURLEY.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

I certify that the foregoing twelve pages contain and form a full, true, and complete transcript of the record and proceedings had in the case of Louis Emmerling vs. Joseph S. Cucullu, No. 2,810 of the docket of the said court.

Witness my hand and the seal of the said court at New Orleans, [SEAL.] this 15th December, A. D. 1857.

J. W. GURLEY, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Louis Emmerling and Joseph S. Cucullu, a manifest error hath happened, to the great damage of the said Joseph S. Cucullu, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 28th of November, in the year of our Lord one thousand eight hundred and fifty-seven.

J. W. GURLEY,
Clerk of the United States Circuit Court
for Eastern District of Louisiana.

Filed 28th Nov., 1857.

J. W. GURLEY, *Cl'k.*

Citation in Error.

THE UNITED STATES OF AMERICA.

The President of the United States to Louis Emmerling, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Joseph S. Cucullu is plaintiff in error and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.